IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
September 19, 2001 Session

KRISTINA BROWN, Individually and on Behalf of All Other Individuals and Entities Similarly Situated in the State of Tennessee, and BOBBY DAVIDSON, Individually and on Behalf of All Other Individuals and Entities Similarly Situated in the State of Tennessee

v.

TOM TAYLOR CHEVROLET-PONTIAC OLDSMOBILE GMC TRUCK, INC. and UNION CITY FORD-LINCOLN/MERCURY, INC.

An Appeal from the Chancery Court for Obion County
No. 20,202 W. Michael Maloan, Chancellor

No. W2000-02890-COA-R3-CV - Filed June 17, 2002

This is a constitutional challenge to Tennessee Code Annotated § 67-1-112, which outlines how a dealer may pass along a business tax to its customers. The plaintiffs bought automobiles from the defendant automobile dealers. The dealers "passed on" their business tax expense to the plaintiffs in an itemized invoice listing the tax as an element of the purchase price. The plaintiffs brought this class action arguing, inter alia, that Section 67-1-112 is unconstitutional because it unlawfully delegates taxation authority to the automobile dealers, and because the discretion granted to the dealers in the statute violates the equal protection clause of the Tennessee Constitution. The trial court upheld the constitutionality of the statute and granted summary judgment in favor of the defendants. Plaintiff Bobby Davidson now appeals. We agree with the reasoning of the trial court, and therefore affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court is Affirmed

HOLLY K. LILLARD, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S. and ALAN E. HIGHERS, J., joined.

Gordan Ball, of Knoxville, Tennessee, for the appellant, Bobby Davidson, Individually and on Behalf of All Other Individuals and Entities Similarly Situated In The State of Tennessee.

George T. Lewis, III, Baker, Donelson, Bearman & Caldwell, P.C., of Memphis, Tennessee, for appellee Union City Ford-Lincoln/Mercury, Inc.

Paul G. Summers, Attorney General and Reporter, and Wyla M. Posey, Assistant Attorney General, of Nashville, Tennessee, for the intervening appellee, Attorney General and Reporter.

OPINION

This is a constitutional challenge to Tennessee Code Annotated § 67-1-112, which outlines how a dealer may pass along a business tax to its customers. The underlying facts in this case are undisputed. Plaintiff Kristina M. Brown ("Brown") bought an automobile from defendant Tom Taylor Chevrolet-Pontiac/Oldsmobile/GMC ("TT Chevrolet"), and plaintiff Bobby Davidson bought an automobile from defendant Union City Ford -Lincoln/Mercury, Inc. ("UC Ford").[1] For each sale, a business tax was imposed on the automobile dealers under the Business Tax Act, Tennessee Code Annotated § 67-4-701, et seq. The business tax expense was then passed on to the plaintiff customers in an invoice itemizing the tax as an element of the automobile sales price.

The statute at issue, Tennessee Code Annotated § 67-1-112, provides:

> The business tax is a privilege tax imposed upon persons engaged in various businesses and activities in the state. If a dealer invoices the business tax as a separate item and passes it on to such dealer's customers, then the tax shall be added to the gross receipts and be used in determining the tax base for both business tax and sales and use tax purposes.

Tenn. Code Ann. § 67-1-112 (1998). This statute codifies an administrative rule, Tennessee Compilation Rules and Regulations 1320-4-5-.03 ("Rule 3"), promulgated by the Tennessee Department of Revenue ("Department") shortly after the Business Tax Act was enacted. On July 28, 1998, the Department issued Revenue Letter Ruling #98-34, which states that "the Department has long recognized that there is no provision restricting the seller from stating the business tax as a separate item on the invoice." With reference to Section 67-1-112, the Department concluded in the Revenue Ruling that "[t]he business tax is imposed on the seller. The seller can pass on this expense by including it in the price of the item sold. . . . [However,] any business tax passed on to the customer must be included in the tax base for both business tax as well as sales and use tax purposes."

On June 24, 1997, Brown filed a class action lawsuit against the Tennessee Automotive Association ("TAA") and TT Chevrolet on behalf of customers who had purchased automobiles from TAA-member automobile dealerships. Brown claimed, among other things, that the dealers misrepresented to consumers that the business tax was an obligation of the consumer. She also alleged that dealers illegally and deceptively shifted the tax burden to consumers.

Almost three years later, on April 12, 2000, Brown was given permission to amend the complaint to add Davidson as a plaintiff and to add UC Ford as a defendant. In addition, the amended complaint dropped TAA as a defendant, dropped the misrepresentation claims, and for the

[1] The defendants will be collectively referred to as "dealers."

first time challenged the constitutionality of Section 67-1-112 and Rule 3. On the same date, the trial court granted summary judgment to TT Chevrolet because it was not a member of the TAA, and because it had correctly computed and collected business taxes from its customers.[2] On August 9, 2000, the Attorney General intervened for the purpose of defending the constitutionality of the statute and the revenue rule.

On October 18, 2000, the trial court entered two separate orders. In one order, the trial court granted UC Ford's motion for summary judgment, holding that it had correctly computed and collected the business tax in accordance with the statute and regulations. In the other order, the trial court found that Section 67-1-112 was constitutional, citing prior caselaw. Davidson then filed this appeal, apparently appealing only the order finding the statute constitutional.[3]

In this appeal, Davidson makes the same arguments as he did to the trial court. First, he argues that Section 67-1-112 is unconstitutional because it permits automobile dealers to "pass on" the dealers' business tax to their customers and, therefore, the dealers are improperly given taxation authority in violation of Article II, Sections 28 and 29 of the Tennessee Constitution.[4] Second, Davidson asserts that the statute is unconstitutional because the dealer has unfettered discretion regarding whether to pass on the business tax to customers and, therefore, the customers are

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[2] That order was not appealed.

[3] In his notice of appeal, Davidson appeals "the Order granting summary judgment to the Defendant, Union City Ford-Lincoln-Mercury, Inc., (Union City Ford), entered in this action on the 18th day of October, 2000." Though two orders were entered by the trial court on that date, in his appellate brief and in oral argument for this appeal, Davidson challenged only the constitutionality of Section 67-1-112. He has not contended that UC Ford erred in its assessment of the tax or its application of the law. Therefore, this appeal considers only the order entitled "Order Granting Intervening Defendant Attorney General and Reporter's Motion for Summary Judgment," which addresses the constitutional issues.

[4] Article II, Section 28 provides in pertinent part:

> The Legislature shall have power to tax merchants, peddlers, and privileges, in such manner as they may from time to time direct, and the Legislature may levy a gross receipts tax on merchants and businesses in lieu of ad valorem taxes on the inventories of merchandise held by such merchants and businesses for sale or exchange.

TENN. CONST. art. II, § 28.

Article II, Section 29 provides in pertinent part:

> The General Assembly shall have power to authorize the several counties and incorporated towns in this State, to impose taxes for County and Corporation purposes respectively, in such manner as shall be prescribed by law; and all property shall be taxed according to its value, upon the principles established in regard to State taxation.

TENN. CONST. art. II, § 29.

subjected to differing levels of taxation. Davidson contends that this denies the customers equal protection and conformity in taxation guaranteed by Article II, § 28.[5]

Only questions of law are involved in this appeal; consequently, we afford no presumption of correctness to the trial court's grant of summary judgment. ***See Bain v. Wells***, 936 S.W.2d 618, 622 (Tenn. 1997). Our review is de novo on the record. ***See Warren v. Estate of Kirk***, 954 S.W.2d 722, 723 (Tenn. 1997).

The trial court determined that Davidson's argument had been rejected by the Tennessee Supreme Court in ***Super Flea Market of Chattanooga, Inc. v. Olsen***, 677 S.W.2d 449 (Tenn. 1984). In ***Super Flea Market***, the Court held that there was no unlawful delegation of taxing authority in requiring flea market operators to collect business taxes from the exhibitors on behalf of the State. The Court concluded that "[i]n reality, it is no different from the sales tax." ***Super Flea Market***, 677 S.W.2d at 451. In this case, the trial court below recognized that the business tax at issue is levied against the dealers, not the customers. It concluded that "Article II, Sections 28 and 29 pertain to property taxation and do not apply to privilege taxes." Finally, the trial court below found that the practice of permitting an automobile dealer to pass on the business tax to its customers is neither arbitrary, capricious, nor wholly unreasonable. Accordingly, the trial court held that Section 67-1-112 is constitutional.

In examining the language in Section 67-1-112, it is clear that the statute does not delegate taxing authority to automobile dealers. It notes only that "[i]f a dealer invoices the business tax as a separate item and passes it on to such dealer's customers," then the amount passed on must be included in the sales price for purposes of determining both the business tax and sales tax due from the dealer. Tenn. Code Ann. § 67-1-112. Therefore, the statute does no more than recognize the Department's position that it "there is no provision restricting the seller from stating the business tax as a separate item on the [sales] invoice."

The facts in the case at bar differ somewhat from those in ***Super Flea Market***, because the business taxes collected by the flea market operators in ***Super Flea Market*** were tax liabilities of the flea market exhibitors. The flea market operators were obligated by statute to collect those taxes on behalf of the local tax collecting authorities. ***Super Flea Market***, 677 S.W.2d at 450. The plaintiffs in ***Super Flea Market*** alleged that the statute was unconstitutional for several reasons, including the allegation that the statute unlawfully delegated tax collecting authority to the flea

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[5] Article II, § 28, as it pertains to Davidson's equal protection argument, reads:

> The ratio of assessment to value of property in each class or subclass shall be equal and uniform throughout the State, the value and definition of property in each class or subclass to be ascertained in such manner as the Legislature shall direct. Each respective taxing authority shall apply the same tax rate to all property within its jurisdiction.

TENN. CONST. art. II, § 28.

market operators. The Tennessee Supreme Court rejected that argument, finding that the statute conferred no tax collecting authority on the operators. Rather, the flea market operators were obligated only to collect the tax for the State, and this obligation was likened to the obligation to collect sales taxes. ***Id.*** at 451. The Court relied on other cases that have upheld taxing plans whereby a non-governmental official was required to collect taxes levied on the taxpayer. ***Id.*** In this case, the business taxes at issue are the obligation of the automobile dealers, not the customers, but the dealers are not prohibited from recouping that amount by charging the customer an increased sales price. However, in this case as in ***Super Flea Market***, the statute at issue confers no taxation discretion to a non-governmental entity. Thus, there is no violation of the Tennessee Constitution.

Davidson's position on appeal may also be construed as challenging the Department's long-standing practice of giving dealers the discretion to pass the business tax on to the consumer. In ***Hooten v. Carson***, 209 S.W.2d 273 (Tenn. 1948), the Tennessee Supreme Court recognized that "[t]he power to tax privileges is not subject to any constitutional limitation except that the tax levied must not be arbitrary, capricious or wholly unreasonable." ***See Hooten v. Carson***, 209 S.W.2d 273, 274 (Tenn. 1948). In this case, the Department's long-standing practice is neither arbitrary, capricious, nor wholly unreasonable. Therefore, this argument must be rejected as well.

The decision of the trial court is affirmed. Costs are taxed to the Appellant, Bobby Davidson, individually and on behalf of all other individuals and entities similarly situated in the State of Tennessee, and his surety, for which execution may issue if necessary.

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HOLLY K. LILLARD, JUDGE